



LAW COMMISSION
TE·AKA·MATUA·O·TE·TURE

December 2011, Wellington, New Zealand | ISSUES PAPER 27

THE NEWS MEDIA MEETS 'NEW MEDIA'

RIGHTS, RESPONSIBILITIES AND
REGULATION IN THE DIGITAL AGE

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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FOREWORD

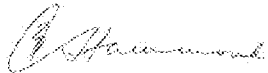
The internet is often referred to as a “disruptive technology”. In the past, the term disruptive carried a negative connotation. Not today. Thanks to the internet and the read/write culture of the web, every citizen with an internet connection now has unprecedented access to information and, for the first time in human history, the ability to publish and exchange data with a potentially global audience.

This networked world is transforming nearly every facet of life. It presents major challenges – and opportunities – to the way governments, the judiciary, and businesses function.

This Issues Paper deals with a vital aspect of this process of transformation: the news media and whether, and how, it should be regulated in this digital world where anyone can break news and comment on public affairs.

The paper also addresses the broader issue of citizens exercising their free speech rights in the digital era, asking whether the laws which are designed to protect against speech abuses are fit for purpose.

We hope this paper, and the preliminary proposals it makes for reform, will be widely debated in New Zealand – in both traditional and new media fora. The issues it grapples with are vital to the health of our democracy. We look forward to hearing what the public thinks of our proposals.



Hon Sir Grant Hammond KNZM
President of the Law Commission

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Ministry of Culture and Heritage

The Office of the Privacy Commissioner

The Human Rights Commission

Crown Law

New Zealand Police

Trade Me

NetSafe

InternetNZ

Newspaper Publishers' Association of New Zealand

The Media Freedom Committee

The New Zealand Press Council

The Broadcasting Standards Authority

Fairfax Media New Zealand

APN News & Media

Television New Zealand

Google

Facebook

Claire Browning

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We also acknowledge the invaluable contribution of Stephanie Bishop who undertook research into New Zealand's new media publishing environment which provided the basis for chapter 2 of this paper.

The Lead Commissioner on this paper was Professor John Burrows. Senior researchers and policy advisers were Cate Honoré Brett and Rachel Hayward.

Call for submissions

The Law Commission is seeking wide feedback from stakeholders and the New Zealand public on the issues raised in this paper.

On page 17 we have posed a number of questions relating to our terms of reference and the contents of this paper. The summary, which can be found on page 3, sets out the various preliminary proposals we have put forward for public discussion. We are keen to receive a broad cross section of views on these questions and our preliminary proposals.

In February 2012 we will be hosting discussion forums on our website where the public can share their views on the issues and proposals discussed in this report.

We are happy to receive submissions or comments on this Issues Paper via our website, email or by mail. The submissions deadline is **Monday 12 March 2012**.

Hard copy submissions and comment should be sent to:

New Media Review

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This Issues Paper is available on the Law Commission's website www.lawcom.govt.nz

Official Information Act 1982

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Submissions to the Law Commission, including those made via our website or comments sent by email will normally be made available on request, and the Commission may refer to submissions in its reports. Any request for withholding of information on grounds of confidentiality or for any other reasons will be determined in accordance with the Official Information Act 1982. If you have privacy concerns please contact us to discuss these before making a submission.

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Summary and preliminary proposals

OUR TERMS OF REFERENCE

1. In October 2010 the Law Commission was asked to review the adequacy of the regulatory environment in which New Zealand's news media is operating in the digital era.
2. In conducting this review we were asked to deal explicitly with the following questions:
 - how to define “news media” for the purposes of the law;
 - whether, and to what extent, the jurisdiction of the Broadcasting Standards Authority and/or the Press Council should be extended to cover currently unregulated news media and, if so, what legislative changes would be required to achieve this end; and
 - whether the existing criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence and privacy are effective in the new media environment and, if not, whether alternative remedies may be available.
3. This Issues Paper unpacks the policy and legal questions underlying these questions and puts forward for public consultation and submission a number of preliminary proposals for legal and regulatory reform.
4. Although on the face of it narrow in scope, this paper deals with issues of fundamental importance to all New Zealanders, including the future of the news media and the rights and responsibilities attached to the exercise of free speech in the digital era.

5. The paper is divided into two parts. In Part 1, which comprises chapters 1 – 6, we address the first two questions posed in our terms of reference. These deal with the special type of publishers known as the “news media” and the laws and regulatory environment in which they operate. In Part 2, comprising chapters 7-8, we deal with the much broader issue of citizens exercising their speech rights in the digital environment and ask whether the current legal remedies for speech abuses are adequate.

PART 1: WHO ARE THE “NEWS MEDIA” AND HOW SHOULD THEY BE REGULATED?

6. Underpinning these questions is the long standing presumption that the news media play a vital role in a healthy democracy and this role requires special legal protections. This is reflected in a long list of legal privileges and exemptions in the New Zealand statute book which we outline in detail in chapter 3.
7. The reporting of news and current affairs involves a strong element of public trust. There is an expectation that the news media, who are granted legal privileges and exemptions, will exercise their publishing rights responsibly.
8. Sometimes that expectation is contained in an express legal requirement that reporting be “fair” or “fair and accurate”. Sometimes it is contained in a requirement of “accreditation”. Sometimes that requirement is justified by adherence to a code of practice and oversight by a regulatory body. At other times the expectation of responsibility is simply assumed.
9. Another presumption underpinning the first two questions of our terms of reference is that the law, or some form of regulation, has a role to play in holding the news media accountable to the public for the exercise of their powers.
10. All publishers are subject to the law as it is enforced in the courts. As far as other forms of regulation are concerned, in New Zealand, only broadcast media are held *legally* accountable to standards through the Broadcasting Act 1989. Print media have traditionally been subject only to industry self-regulation through the Press Council, membership of which is voluntary. Because one of the critical functions of the news media in a democracy is to act as a watch dog on government, there is a powerful argument for ensuring the state does not have any censorship powers over the news media. Traditionally this has been the primary justification for ensuring the newspaper industry has not been subject to statutory oversight in New Zealand and many other Commonwealth countries.

The policy problems:

11. Before the advent of the internet there was little practical necessity to consider the question: ‘who are the news media’? The ‘news media’ simply comprised the state-funded public service broadcasters and the large private industry which between them produced the nation’s daily newspapers, television and radio news and current affairs programmes.
12. These were the entities, most of them privately owned, entitled to access the special legal privileges set out in the statute book, and these were the entities held accountable to the legal and ethical standards associated with the exercise of this type of speech.
13. However in the era of the read/write web, the traditional news media, which we refer to in this report as the mainstream media, have lost their monopoly on the generation and dissemination of news and commentary. They must now compete with a range of new digital publishers, including news aggregators and current affairs bloggers, who are undertaking similar types of publishing as the mainstream media. In chapter 2 we provide an overview of this rapidly evolving new media landscape.
14. At the same time the digital environment is resulting in increasing convergence between formerly distinct sectors of the media and communications industry.
15. On one level this convergence is resulting in the collapse of the boundaries which have traditionally separated the print and broadcast segments of the news media. Increasingly these once discrete entities are transforming themselves into multi-media companies, capable of producing news in a rich mixture of text and audio-visual formats, disseminated on an ever expanding array of platforms and devices, and promulgated via social media.
16. This new decentralised and democratised model for the generation and dissemination of news and current affairs is enriching public debate. It has the potential to strengthen democracy by increasing participation in public affairs; widening the sources of information available to the public; providing a greater diversity of opinion and strengthening the levels of scrutiny and public accountability.
17. However it also creates a set of policy and legal challenges, including the following two key issues which are the focus of this review:
 - a lack of clarity in law as to which types of publishers should qualify for the statutory privileges and exemptions which at the moment apply to the “news media”;
 - a lack of regulatory parity, both between different types of traditional news media (print and broadcasters) and between traditional news media and the new digital publishers.

18. These questions are not merely academic, but are producing real problems for consumers and producers of news. Examples of these problems include:
- At present there are gaps in the regulation of some types of content produced by traditional news media. For example, while it is possible to complain to the Broadcasting Standards Authority about a serious inaccuracy in a news or current affairs programme that is broadcast on radio or television, it is not possible to complain about exactly the same content made available on-demand on a broadcaster's website, or about the text in a story on a broadcaster's website.
 - Similarly, while the provision of audio-visual content assumes an increasing importance in the news offerings of newspaper websites, these companies are not subject to the same statutory regulation which applies to other broadcasters.
 - Meanwhile, new web-based publishers of news and current affairs, both commercial and amateur, are not currently accountable to *any* regulator or complaints system – other than the basic legal framework which applies to all citizens, restricting speech which defames or causes harm.
 - On the flip side, some new publishers are facing obstacles in their ability to gather news and access information or places, such as the press gallery or news conferences, because they are not always regarded as “bona fide” members of the news media.
19. Over and above such pragmatic and competitive concerns looms the much larger public interest question: how to protect and nurture the generation and dissemination of news and current affairs in this dynamic new environment?
20. These are just some of the drivers which sit behind the first two questions posed in our terms of reference. From a public policy perspective they require us to consider whether, and in what circumstances it may be in the public interest to:
- extend the legal privileges and exemptions which currently apply to traditional news media to some new publishers; *and*
 - require this category of publishers to be held accountable, via some sort of regulatory regime, to the types of journalistic standards that have traditionally applied to news media.
21. In chapters 3 and 4 of this paper we provide a detailed analysis of the arguments for the existence of this system of privileges and accountabilities for the news media, and suggest why it is important both to retain this system for traditional news media, and extend it to some other publishers.

Part 1: A summary of our preliminary conclusions and proposals

22. With respect to the first policy question, *is it in the public interest to extend the legal privileges and exemptions which currently apply to traditional news media to some new publishers*, our preliminary view is “yes” - provided these privileges are matched by acceptance of the countervailing standards and accountabilities which have traditionally applied to the mainstream news media.
23. Our survey of New Zealand’s web publishing environment shows there are a number of new web-based entities taking on some of the democratic functions traditionally assigned to “the press”: providing a public watchdog on corporate and state power and facilitating the free flow of information and ideas among citizens.
24. As a matter of principle we believe the legal and regulatory environment should encourage diversity in the news media market.
25. New Zealand is an increasingly ethnically and socially diverse nation and it is critical that this diversity of view points and interests be reflected in our national debates and in the formation of public opinion.

In our view these new publishers should, in principle, enjoy the same media protections and privileges accorded traditional news media.

26. This was also the conclusion reached by the Canadian Supreme Court in 2009 when considering the scope of defences available in defamation actions. Writing for the majority, McLachlin C.J. expressly recognised and endorsed the complementary role of emerging new media:¹

[t]he traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists.

These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets.

The second question then is how to define which publishers should benefit from the system of legal exemptions and privileges currently reserved for the “news media”?

27. As we explain in chapter 4 of this Issues Paper, these legal protections are designed to protect a special type of speech with special characteristics – including, most significantly a commitment to truthfulness and accuracy.
28. The type of speech the law affords special protection must be exercised responsibly.
29. We therefore put forward for public discussion the following set of criteria which we propose might provide a statutory definition of the “news media” for the purposes of accessing the legal privileges and exemptions.

For the purposes of the law the “news media” includes any publisher, in any medium, who meets the following criteria:

- a significant proportion of their publishing activities must involve the generation and/or aggregation of news, information and opinion of current value;
- they disseminate this information to a public audience;
- publication must be regular;
- the publisher must be accountable to a code of ethics and a complaints process.

30. It is important to note this definition is not intended to exclude others from reporting or commenting on the news. It simply proposes a set of statutory criteria to resolve the current uncertainty as to which groups and individuals qualify for the legal privileges and exemptions assigned to the media. It does not favour a particular category of publisher, traditional or new media, but rather seeks to protect a *special type of speech and publication purpose*.
31. The implication of this definition is that those publishers who wish to be regarded as the news media for the purposes of the law must be subject to a complaints process.
32. The second question posed by our terms of reference is to which complaints process should the currently un-regulated news media be held accountable – the Broadcasting Standards Authority (BSA) or the Press Council?
33. In chapter 5 we consider the strengths and weaknesses of these two existing regulatory bodies, the Press Council and the BSA. Gaps and inconsistencies already exist in how these two bodies cover traditional news media and our preliminary conclusion is that neither is well suited to respond to the rapidly evolving converged new media environment.
34. In New Zealand representatives of both print and broadcast media have commented on the inevitability of increased convergence and its implications for regulation, as per the following extract from a Television New Zealand response to a 2008 government consultation on regulation in the digital era:²
- The traditional reasons for regulating broadcasting in the traditional ways are fast disappearing. Distinctions between broadcasting, telecommunications, print and other forms of media are becoming increasingly blurred. This calls into question the logic of maintaining separate regulatory frameworks – BSA, ASA, Press Council.
35. In chapter 6 we review the various regulatory models for news media and how they are applied in democracies around the world and note that the regulation of the news media and the wider communications sector is the subject of major reviews in a number of overseas jurisdictions, as the impacts of convergence and digital technology challenge the traditional format-based approaches.³

36. Our preliminary proposal, outlined in detail in chapter 6, is to establish a new, independent regulator for all **news media**, regardless of the format or delivery platform.
37. The model we put forward for discussion in this paper is underpinned by the following fundamental principles:
 - A free press is critical to a democracy. The Bill of Rights guarantee of freedom of expression must lie at the basis of any news media regulation. It requires that sanctions be proportionate, that accountability rather than censorship should be the guiding principle, and that any regulation should be free of state control.
 - The news media should exercise their freedom responsibly and be accountable when they fall below the appropriate standard. The privileges and exemptions conferred on the news media by law should be conditional on a guarantee that there will be responsibility and accountability.
 - Media regulation should be truly independent, both from government, and also from the industry itself.
 - Any regulatory system should foster rather than stifle diversity and growth in the generation of news and current affairs in New Zealand.
 - The system of regulation should be flexible and platform neutral, although standards may sometimes need to take account of different modes of delivery or types of publisher.
 - Any system of media regulation should not inhibit the freedom of speech of individuals who are not part of the news media. There should remain a right for individuals to speak out, however unorthodox or even wrong their views may be.

The new regulator we are proposing would have the following features:

- It would be independent of both government and the news industry.
- Appointments to the regulator would be by an independent panel. The regulator would comprise industry and non-industry representatives, the latter being the majority.
- The regulator would be responsible for working with the various sectors of the industry and consulting with the wider public to devise the set of principles by which it adjudicates. As is already the case under the current broadcasting regime, we envisage there being a number of different codes based on these principles but appropriate to different news producers and publishing environments – for example bloggers may devise their own codes.
- The regulator would be recognised by statute and funded by contributions from members and subsidised by the state.

38. As is currently the case, publishers themselves would be responsible for trying to resolve complaints in the first instance, and the regulator would effectively adjudicate only those complaints which had not been satisfactorily resolved between the complainant and the publisher. Many traditional and new web-based publishers have robust processes for responding to readers' concerns. We do not propose disturbing those arrangements.
39. Adequate resourcing is crucial for the effectiveness of our proposed regulator. However the burden of funding this body should not fall solely on news publishers.
40. It is in the public interest that as many news publishers, including small start-ups, belong to such a standards body and a lack of financial resources should not be an impediment to joining. The state and wider public have a strong interest in a robust and ethical news media and we see no reason why this body should not receive state support, provided there are no strings attached to the appropriation. There are precedents for such arrangements in other jurisdictions.⁴

Which publishers would be subject to the new regulator?

41. Our proposed statutory definition of "news media" outlined above, implies that all publishers who wish to access the legal privileges of the news media, such as exemptions from the Privacy Act, would have to be subject to the independent complaints body.
42. Beyond that self-selecting criterion, we seek submissions from the public and stakeholders as to whether any publisher should be compelled by statute to be subject to the body or whether it should be entirely voluntary.
43. In chapter 6 of the Issues Paper we put forward two options for consideration:

Option one:

- Membership should be entirely voluntary. Publishers who wish to have the legal standing of news media would join, because only by being subject to this complaints body would they meet the statutory requirements of "news media".

Option two:

- Membership should be compulsory for some categories of news publishers who meet a proposed set of criteria including for example:
 - those for whom publication is undertaken as a business or commercial activity;
 - those who are providing broad or general news services to a wide public.
- Membership would be voluntary for others.

44. Other criteria which may be appropriate to determine compulsory membership might include audience size and reach. We seek public views on those issues.

Entertainment

45. The new regulatory body we propose in this Issues Paper would be set up to deal with unresolved complaints relating to news and current affairs content. That was the focus of our terms of reference.
46. However for many corporates, the generation and dissemination of news and current affairs forms only one part of their activities. The commissioning, production, purchase and distribution of entertainment content is an increasingly dominant part of the core business of most media companies.
47. In New Zealand entertainment content is currently subject to two different statutory regimes: films and videos are subject to the statutory regime set out in the Films, Video and Publications Classification Act 1993 which establishes the Office of Film and Literature Classification and creates the role of the Chief Censor. Entertainment content that is broadcast on radio and free-to-air or subscription television services is subject to the Broadcasting Act 1989. There is some overlap between the two statutes, as broadcasters must not broadcast any films that have been banned or restricted under the censorship regime.
48. Both these statutes were designed for a pre-digital era and create a regulatory regime based on increasingly problematic distinctions between the formats in which entertainment content is consumed, rather than the content itself.
49. While it is beyond the scope of our terms of reference to explore these issues in any depth, we believe there is a strong public interest in continuing to provide regulatory controls on some types of entertainment content, most notably free to air content which is harmful to children. We note that the issue of entertainment regulation has been under active consideration by the Ministry of Culture and Heritage and the Office of the Chief Censor within the broader context of content regulation in the digital era.
50. We also note that the Australian Law Reform Commission has recently released a report recommending radical reform of that country's regulation of entertainment content across all platforms and those proposals may provide useful material for those considering options for New Zealand.⁵

PART 2: SPEECH HARMS: THE ADEQUACY OF THE CURRENT LEGAL SANCTIONS AND REMEDIES

51. The large majority of New Zealanders publishing on the internet would not come within the ambit of the new regulatory system we propose. In essence they will be able to exercise complete freedom of speech. They can, without fear of any regulator, be inaccurate in their facts, unbalanced in their coverage and extreme in their opinions. The public can rely on them, or not, as they see fit. They would not be recognised as “news media” for the purposes of the statutory privileges.
52. But, even though they would be beyond the reach of any news regulator, these other publishers will remain subject to the *law*. They will be liable to the same consequences as the established media for wrongs such as defamation, contempt of court, publication of a suppressed name, breach of copyright – just as they are now.
53. However, not everyone who publishes on the internet is aware of or respects the existing legal constraints on speech. Added to this, the internet and its associated technologies create novel ways of causing harm through speech abuses – and creates numerous challenges for those seeking to enforce the law or obtain remedies.
54. In chapters 7–8 of this Issues Paper we address these issues and the third leg of our terms of reference:

Whether the existing criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence, and privacy are effective in the new media environment, and if not, whether alternative remedies might be available.
55. Except in the area of cyber-bullying, there is little empirical research available about the size and nature of the problems associated with speech abuses on the internet in New Zealand. The public consultation following the release of this Issues Paper will hopefully provide a better understanding of the issues.
56. In chapter 7 of this paper we draw on information from a number of public and independent organisations, including New Zealand Police, the offices of the Privacy Commissioner and the Human Rights Commission and the internet safety organisation NetSafe, to provide a preliminary assessment of the level of harms. We also sought the views of Trade Me, Facebook and Google regarding the scope of the problem and the efficacy of their community monitoring and reporting tools with respect to managing speech abuses on message boards and social media sites.
57. Our preliminary conclusion is that the existing and potential harms are significant, particularly for young people whose lives are increasingly enmeshed in social media.

58. Our preliminary proposals involve a combination of legislative amendments and alternative complaints procedures. The law, even when better tailored, can only go so far. For some people the machinery of the courts and the criminal justice system presents too large a hurdle to pursue a prosecution, while taking civil legal action for wrongs such as reputational damage or privacy breaches is beyond the financial reach of most citizens.
59. Our first set of proposals is aimed at ensuring the types of serious speech harms arising from digital communication are covered by appropriate offences and that existing speech laws can be readily applied in the digital environment. We propose to:
- review the statute book to ensure all provisions imposing controls on communication are expressed widely enough to fulfil the purpose intended in the particular legislation in the digital environment;
 - consider introducing a new offence of maliciously impersonating another person. As we discuss in chapter 7, real harm can result from malicious impersonation on the web and currently there is no legal remedy unless the impersonation constitutes an element of fraud;
 - amend the Harassment Act 1997 to remove any doubt that its provisions can be applied to cyber-bullying and other forms of online intimidation, by extending its definitions to all forms of electronic communication and material published on websites;
 - clarify whether the offences relating to the misuse of a “telephone device” in the Telecommunications Act 2001 should be extended to computers and review whether the threshold for an offence is suitable for application to internet communications;
 - amend the Human Rights Act 1993 to remove any doubt that provisions barring publications “likely to excite hostility against or bring into contempt” any group of persons “on the ground of the colour, race, or ethnic or national origins of that group of persons” includes all forms of digital publishing;
 - consider amending the sections of the Human Rights Act which address sexual and racial harassment to reflect the importance of cyberspace as a “public place” from which people should not be excluded as a consequence of significant and harmful sexual or racial harassment by others.
60. In addition to these proposals, the Law Commission has previously recommended a number of changes to the Privacy Act 1993 which would address some of the gaps we have found in this review. As well as those changes, we also consider there may be merit in making it an offence, in some circumstances, to publish intimate photographs even when they were taken with the subject’s consent.

61. Finally, incitement to commit a crime is an offence even if the crime is not committed. Yet incitement to commit suicide is not an offence unless the person actually does so, or attempts to do so. Given the distress such incitements may cause in themselves, let alone the possibly devastating outcome, we think there is a strong case for making incitement to suicide criminal.

A Communications Tribunal or Commissioner?

62. Law reform alone will only go so far in addressing harmful speech in the digital era. We recognise the courts are heavy machinery for many people. A distressed victim or a young person may not wish to give evidence in court. Pursuing a civil remedy in court may be expensive, time consuming and distressing.
63. In many cases, those who have been the victim of harassment or bullying or whose reputations have been unjustifiably damaged, simply wish for the activity to stop or for the offending material to be removed. And yet often, as we discuss in chapter 7, these people feel they have no avenue of complaint or means of redress.
64. In the final chapter of this report we put forward for discussion two alternative options for new mechanisms for dealing with harms arising from speech abuses.

Communications Tribunal

65. The first proposal outlined is a Communications Tribunal that would operate at a level lower than the court system and which could administer speedy, efficient and relatively cheap justice to those who have been significantly damaged by unlawful communications.
66. The Tribunal would only deal with cases which it judges would have met the threshold of a breach of the law. It should not be a port of call for those with insubstantial complaints.
67. Harm must have resulted or be demonstrably likely to result. That harm might be financial, or might be psychological harm such as distress, intimidation, humiliation or fear for safety.
68. It would not have the power to impose criminal sanctions. Only the courts should be able to enter convictions and impose criminal sanctions such as fines and imprisonment.
69. Sanctions and remedies available to the Tribunal would include the ability to award monetary compensation up to a prescribed level; to order publication of an apology or correction; to order that a right of reply be granted; to order that the defendant cease the conduct in question (a type of injunction); and to make take-down orders against either the perpetrator or an innocent avenue of communication such as an ISP. It might also make a declaration that statements made about the victim are untrue. Failure to comply with an order would be an offence.

A Communications Commissioner

70. The second option we put forward for discussion is the establishment of a Communications Commissioner, possibly attached to the Human Rights Commission.
71. Many of the concerns expressed about the harms caused by social media and the internet can be traced back to the fact that there is no clearly accessible central place to take complaints, concerns or questions about material published on the internet. As noted in chapter 7, people can be left feeling that they are “shouting into space.” One response to this is to provide a portal for information and assistance.
72. The role of this person would be to provide information and where possible assist in resolving problems in an informal manner, for example through mediation. Where appropriate, he or she could also make recommendations to responsible authorities and individuals with the aim of preventing problems or improving the existing situation. In cases of serious harm, the Commissioner may refer a complainant to the police. In other cases, many of the harms that we have discussed could be resolved informally by a person with some authority contacting a website administrator to draw their attention to objectionable material, identifying the harm the post is causing, or how it may be in breach of the law.
73. The law already addresses a significant proportion of the harms that are occurring as a result of speech abuses on the internet, but often those affected – and the perpetrators themselves – may be unaware of the nature of the offence and the potential remedy. A key function of the Commissioner would be to assist citizens to access the law.
74. A Commissioner would need some limited powers of investigation and inquiry, but we do not envisage he or she would have powers of enforcement. Any matters that required enforcement powers should be left to the police or other authorities. However we believe the role would have the independence and authority to liaise effectively with publishers. Feedback we received from Facebook suggests that they are responsive to approaches from authoritative bodies when there is clear evidence of behaviour which contravenes domestic law and or their own terms and conditions.
75. We welcome public feedback on these proposals and the questions outlined on page 17.

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- 1 *Grant v Torstar Corp* [2009] SCC 61.
 - 2 TVNZ “*Separating Roles: A proposed approach to the “Future of Content Regulation”* consultation paper (2008).
 - 3 In Britain a wide ranging inquiry into news media standards and regulation is being led by Lord Justice Leveson. For the full terms of reference and supporting information see < www.levesoninquiry.org.uk >. In Australia there are currently two reviews into media regulation underway. One, focused on the news media, is being led by Federal Court Judge Ray Finkelstein. The other, a broader review, led by the Department of Broadband, Communications and the Digital Economy, is considering the implications of the converged media and telecommunications market for a range of policy issues including licensing and regulation; spectrum allocation and management; local content requirements; media diversity, competition and market structure and community standards. The more tightly focused Finkelstein review is expected to provide its findings to the Convergence Review in early 2012.
 - 4 Examples of self-regulatory media bodies that receive some funding from the state, include Finland (where half the costs of the council are funded by the state); Germany (where the Council is part funded by the state), and Quebec, (part state-funded). In Germany this funding is underpinned by statute. The stated purpose of the statute is to guarantee the independence of the complaints committee of the German Press Council. The state is barred from interfering in any way with the work of the German Press Council.
 - 5 In September 2011 the Australian Law Reform Commission published its report and recommendations for a radical reform of Australia’s regime for classifying and managing offensive and restricted content. Again, these proposed reforms of the traditional media classification system for television programmes, films, videos, and computer games, are designed to provide a robust regulatory response to the new multi-platform delivery channels now available. For details see Australian Law Reform Commission *National Classification Scheme Review* (ALRC DP77, 2011) < www.alrc.gov.au >.

Questions

Part 1. Who are the news media and how should they be regulated?

1. As a society, do we still depend on the news media to provide a reliable and authoritative source of news and information about what is going on in our country? (chapter 4: What distinguishes “news media”- and why it matters)
2. Currently our law gives the “news media” special privileges and exemptions in recognition of the important role it plays in a democracy. Is it still in the public interest to treat the news media as a special class of publisher, afforded special legal privileges? (chapter 3: The news media’s special legal status)
3. Few of the Acts which give the news media special legal status actually define what is meant by “news media.” Do you agree with the following definition we have proposed? (chapter 4 at para 4.102)
 - a significant proportion of their publishing activities must involve the generation and / or aggregation of news, information and opinion of current value, for the;
 - purpose of dissemination to a public audience;
 - publication must be regular;
 - the publisher must be accountable to a code of ethics and a complaints process.
4. Because the news media depends on public trust, and can exercise considerable power in society, it has traditionally been held accountable to higher ethical standards than other types of publishers. In the web environment, with its facility for public participation, instant feedback and moderation, is it still necessary to hold the news media accountable to some external regulator? (chapter 6: Regulation of the news media at 6.41).
5. If you think it is in the public interest for the news media to continue to be subject to some form of external accountability, what is the most appropriate form of regulation? (chapter 6).
 - Is there still a case for treating broadcasters differently from other publishers, continuing to make all broadcasters subject to Government imposed regulation, as is the case at present?

- If you think that media convergence means there is no longer a strong case for treating newspaper publishers and broadcasters differently, then what is the most appropriate form of regulation for the news media?
 - State regulation, with standards and sanctions set out in legislation?
 - Some form of independent regulation such as we propose where neither the government nor the news industry controls the regulator?
 - If you support the independent model we propose, should membership be entirely voluntary or compulsory for some publishers?
6. Traditionally, the standards to which the news media have been held accountable have dealt with the following matters: (chapter 4 at 4.30)
- Accuracy;
 - Fairness and balance – ensuring for example that news is not deliberately distorted through the omission of important facts or view-points;
 - Respect for individuals’ rights to privacy;
 - A commitment to public interest rather than self-interested publishing;
 - Transparency; ensuring conflicts of interest are declared;
 - Good taste and decency; ensuring the general public is not offended by the gratuitous publication of offensive content.
- Do you think these standards are still important?
7. Do the internet and the facility for others to comment and participate in the news process change any of these standards? (chapter 6 at 6.41)
8. Should all news media be accountable to the same standards irrespective of the medium in which they publish? Or is there a distinction to be made between content which is broadcast to mass audiences simultaneously and content which is accessed by individuals on demand? (chapter 6 at 6.92)
9. Is there a case for extending the news media’s legal privileges to non-traditional publishers, such as bloggers, who wish to undertake news reporting and commentary on public affairs? (chapter 4 at 4.80)
10. If so, is it reasonable to expect those non-traditional publishers wishing to access these legal privileges reserved for the news media to be also be accountable to standards and an external body? (chapter 4)

Part 2 Speech harms: The adequacy of the current legal sanctions and remedies

11. How serious a problem do you think speech abuses are on the internet? eg cyber-bullying and harassment, harms to reputation or invasions of privacy. (chapter 7)
12. How effective are the non-legislative remedies that operate within online communities, including the systems of online reporting employed by social media sites such as Facebook? (chapter 7 at 7.144)
13. Do you think the law is currently able to deal adequately with these sorts of damaging speech when it occurs on the internet? (chapter 7.60)
14. Do you support the idea of an alternative tribunal able to provide speedy and efficient remedies for those who have been harmed by a criminal offence on line? (chapter 8 at 8.43)
15. Do you have any other comments on the proposals in this Issues Paper, or on its contents?

Chapter 1

The context of our review

THE WORLD WIDE WEB

- 1.1 Somewhere in the Egyptian region of Ibrahimya is a child named “Facebook Jamal Ibrahim.” According to a report in Egypt’s Al-Ahram newspaper, the child’s young father decided to name his first born after Mark Zuckerberg’s social networking site to honour the critical role it played in fomenting and executing the January 2011 popular uprising against President Hosni Mubarak.
- 1.2 Commenting on this story in a blog post on the website TechCrunch, Alexia Tsotsis noted that “the baby girl could just have easily been called “Twitter” “Google” or even “Cellphone Camera.” However, for the moment at least, Facebook had become “the umbrella symbol for how social media can spread the message of freedom.”⁶ Tsotsis went on to suggest a Nobel Peace Prize should be awarded to the “internet as a whole for all it had done to advance democracy in the Middle East and North Africa.”
- 1.3 The fact that social media, rather than traditional media brands such as CNN or the BBC, was celebrated as the agent of “people power” in Tsotsis’ column is emblematic of another revolution that has swept the world over the past decade, transforming societies and challenging the fundamentals of commerce, politics, media and the law.
- 1.4 This revolution, like the 18th century Industrial Revolution, has been propelled by technology, specifically, the digitisation of information and the development of a global network of computers by which to transmit this data – the internet.
- 1.5 Together these have created a paradigm shift in how individuals and societies function, giving birth to what is variously described as the “digital age” or the “global information society”.

- 1.6 An offshoot of an American Cold War military defence project, the internet in its earliest iterations was designed to facilitate communication and file sharing between a closed network of computers. By 1971 it had been extended to embrace a network of 23 government and university research centres across the United States. Two decades later, the transformative potential of the internet began to be realised with the invention of the World Wide Web, the system of computer servers and communication protocols which allows information (text, audio and video) to be transmitted and retrieved by users connected to the internet.
- 1.7 The next step-change occurred at the turn of the century with the arrival of what is commonly known as web 2.0, which provided the platforms and tools to allow users with no specialist knowledge to generate and share their own content and to perform myriad functions from social networking to online learning, shopping and entertaining.
- 1.8 The speed with which the world has entered the web 2.0 age has been breathtaking. In 2009, just four decades since its inception, the International Telecommunication Union estimated that 2 billion people, or just under a third of the world's population had internet connection.⁷ According to InternetNZ there were 3.6 million internet connections in New Zealand in October 2011.⁸
- 1.9 At the same time quantum leaps in the science of digitization and micro-processing are enabling the transmission, retrieval and storage of an almost infinite quantity of data at speeds and costs unimaginable only a decade ago.
- 1.10 One of the defining features of the internet, exemplified by the popular uprisings in Egypt and Tunisia in early 2011, is its ability to simultaneously connect thousands of people and to facilitate the continuous exchange of rich information (including text, audio and video) among them via the web.
- 1.11 In this important respect, the internet not only dissolves distance and time, it also collapses the previous boundaries between different modes of communication – the printed and spoken word, the still and moving image – and the means by which these forms of communication were previously transmitted: the telephone, the radio, the television, scanners and facsimile machines.
- 1.12 This phenomenon, known as 'convergence' is one of the critical concepts underpinning the internet age and driving both technological and cultural change. On a technological level this can be seen in the rapid evolution of computers, telephones, televisions and audio-visual recorders into powerful multifunctional devices, such as laptops, netbooks, smart phones and iPads, operating on networked digital platforms.
- 1.13 Users of these technologies can now simultaneously surf the internet, conduct face-to-face conversations with friends or colleagues across the world, trade shares, access a plethora of different news and entertainment and broadcast their every thought to a potentially global audience using platforms such as Twitter.

- 1.14 Just as the advent of the mechanical printing press in the 15th and 16th centuries facilitated mass literacy, providing the conditions for the political, economic and social transformations of the Renaissance, so too the internet has provided the tools for social transformation.
- 1.15 Given the speed and rate of these changes it is impossible to predict precisely what impact this new digital era will have on future societies. However it is already clear that the internet is presenting major challenges to the way governments, the judiciary, businesses and the media carry out their functions.
- 1.16 At the same time, it is forcing us to rethink fundamental human constructs such as privacy, identity, transparency, anonymity, memory, security, and intellectual property.
- 1.17 Commenting on recent discussions among G8 nations on regulation and the internet, American author and blogger Don Tapscott summarised the scale of the change heralded by the internet and the read/write culture of the web:⁹

[t]he Internet is changing every institution in society. It enables new approaches to innovation, requiring new thinking about patents and copyright. It renders old institutions naked, requiring more transparency on the part of governments and corporations. It disrupts old models of learning and pedagogy demanding a [changed] relationship between students and teachers in the learning process. It offers new models of democracy based on a culture of public discourse, in turn compelling old style politicians to engage their citizens. It turns intellectual property into bits, that don't know the old rules that governed [how] atoms behave. It drops the transaction costs of dissent, subjecting dictators and tyrants to the power of mass participation. It breaks down national boundaries and [requires] a rethinking of how peoples everywhere can cooperate to solve global problems. And, for the first time in history, children are an authority on the most important innovation changing every institution in society.

- 1.18 In essence, the web has placed the tools of publishing in the hands of every individual with access to it. And, just as critically, platforms such as Facebook, which now boasts over 700 million users worldwide, allow those individual voices to connect and aggregate, creating virtual global “communities of interest”. Thanks to the disruptive nature of the web, these cyber crowds are capable of wielding levels of power and influence hitherto reserved for the mass media and those with access to traditional sources of economic and political power.
- 1.19 The medium in which this great proliferation of publishing is taking place possesses a set of quite unique characteristics which together help explain the game-changing nature of this technology. These include the following:
- publication on the internet is both instantaneous and global;
 - once published, digital content is virtually un-erasable;
 - users can publish and participate in online activities without revealing their real identities;

- there is an almost infinite capacity to store data of every kind, from the millions of “tweets” broadcast each day, to the world’s largest libraries;
- the development of powerful search engines and web browsers allows instant, and perpetual, retrieval of this data, the vast bulk of which can be accessed freely;
- the decentralised architecture of the internet and the speed and frequency with which data is saved, copied, cross-referenced, routed and re-routed around the globe makes the system highly resistant to attempts to control how users behave or to interrupt or prevent the uploading and downloading of content from the vast network of servers and computers which comprise the web.

WEB 2.0 AND THE NEWS MEDIA

- 1.20 Before the invention of the web, mass publishing was largely a capital intensive business, reserved for those with access to multi-million dollar presses and costly physical distribution systems, or, in the case of broadcasting, expensive audio-visual recording and transmitting systems and costly government licences to use scarce airwaves.
- 1.21 Not only has the internet disrupted this model by reducing the barrier to entry to extraordinarily low levels, but it has also challenged the commercial model which had, for more than 150 years, funded the gathering of news and the professionalisation of journalism. Historically, newspapers’ profitability turned on their ability to deliver mass audiences to advertisers: now those audiences have migrated online, where news from myriad sources is available free of charge and where advertisers have a wide range of options for reaching consumers, including online retailing.
- 1.22 At the same time traditional news media must now compete with a vast spectrum of new publishers. Included in that spectrum are sites like WikiLeaks, and the giant news aggregators like Yahoo and Google News. Alongside these are the millions of bloggers, many of whom also aggregate and disseminate content produced by traditional news media.
- 1.23 And while only a very small percentage of these millions of digital publishers will have as their primary purpose the collection and dissemination of news, all are *capable* of publishing, and passing on, text and audio-visual information, instantaneously and without the fetters of lawyers, editors and fact checkers.
- 1.24 Like many other established institutions the internet has presented traditional news media companies with a raft of opportunities and challenges, some driven by the technology itself, others arising from this changing competitive environment in which they now operate. Foremost among these are:

- the convergence of formerly distinct sections of news media on the web as traditional print publishers and broadcasters transform themselves into “multimedia companies” capable of publishing news in numerous channels;
 - the requirement for all news companies to respond to the demands of continuous news deadlines on the web and to be competitive in the “live” or “spot news” market;
 - the requirement for news companies to both participate in, and compete with, non-traditional news sources, including social media platforms such as Twitter and Facebook;
 - the challenge to the news media’s ability to retain control of, and monetise, exclusive content in an environment designed for copying, sharing, linking, repackaging and re-publishing.
- 1.25 This rapidly changing economic and competitive environment in which the traditional news media now finds themselves has given rise to a number of fundamental questions about the function and sustainability of the news media. Some, including *The Economist*, have gone so far as to suggest “[t]he mass-media era now looks like a relatively brief and anomalous period that is coming to an end.”¹⁰
- 1.26 Whether or not this prediction proves accurate, there can be no doubt the impacts of the internet on the traditional news media are profound.
- 1.27 Among the many issues under scrutiny in this challenging new context are the questions of media standards, and the legal and regulatory environment in which the news media operate.

United Kingdom and Australia

- 1.28 In Britain, the phone hacking scandal which has enveloped Rupert Murdoch’s publishing conglomerate, News International, has given rise to a wide-ranging independent inquiry into the “culture, practices and ethics of the press” led by retired judge Lord Justice Leveson.¹¹ As well as investigating the specific allegations relating to *News of the World*, the inquiry has been asked to make recommendations:
- a. for a new more effective policy and regulatory regime which supports the integrity and freedom of the press, the plurality of the media, and its independence, including from Government, while encouraging the highest ethical and professional standards;
 - b. for how future concerns about press behaviour, media policy, regulation and cross-media ownership should be dealt with by all the relevant authorities, including Parliament, Government, the prosecuting authorities and the police.
- 1.29 To assist the inquiry team identify the key public policy issues underpinning the inquiry, Lord Leveson has conducted a number of seminars focusing on:
- the competitive pressures on the press and the impact on journalism;

- the rights and responsibilities of the press;
 - supporting a free press and high standards – approaches to regulation.
- 1.30 The Leveson panel is to include the impact of social media within the ambit of its inquiry and is due to report back its recommendations on future regulatory approaches within a year.
- 1.31 Parallel to the Leveson inquiry, in September 2011 the Australian Government announced its own independent inquiry into media standards and regulation to be led by former Federal Court Judge Ray Finkelstein. Its terms of reference are to examine:¹²
- a) The effectiveness of the current media codes of practice in Australia, particularly in light of technological change that is leading to the migration of print media to digital and online platforms;
 - b) The impact of this technological change on the business model that has supported the investment by traditional media organisations in quality journalism and the production of news, and how such activities can be supported, and diversity enhanced, in the changed media environment;
 - c) Ways of substantially strengthening the independence and effectiveness of the Australian Press Council, including in relation to on-line publications, and with particular reference to the handling of complaints;
 - d) Any related issues pertaining to the ability of the media to operate according to regulations and codes of practice, and in the public interest.
- 1.32 Although arising in different contexts, the terms of reference for these two reviews share certain common themes, including the impact of technology on the economic model, competitive environment and standards and practices of mainstream media companies.
- 1.33 In Australia, the Finkelstein inquiry is taking place within the context of a much broader government review into the impact of convergence on the entire media and communications landscape. The Convergence Review, led by the Department of Broadband, Communications and the Digital Economy, is considering the implications of the converged media and telecommunications market for a range of policy issues including licensing and regulation, spectrum allocation and management, local content requirements, media diversity, competition and market structure and community standards. The more tightly focused Finkelstein review is expected to provide its findings to the Convergence Review in early 2012.
- 1.34 Besides these two reviews, in September 2011 the Australian Law Reform Commission published its report and recommendations for a radical reform of Australia's regime for classifying and managing offensive and restricted content.¹³ Again, these proposed reforms of the traditional media classification system for television programmes, films, videos, and computer games are designed to provide a robust regulatory response to the new multi-platform delivery channels now available.

The New Zealand context

- 1.35 In 2006 the then Labour-led government initiated a far-reaching *Review of Regulation for Digital Broadcasting* with similar scope to Australia's Convergence review. The terms of reference for the joint Ministry of Culture and Heritage and Ministry of Economic Development review encompassed a wide range of issues including the implications of digital technology for competition and diversity; distribution channels; intellectual property rights; content acquisition; accessibility to publicly funded and public service content; networks and access to spectrum.¹⁴
- 1.36 While this review was discontinued by the incoming government, work building on this review has continued within the relevant Ministries, including on-going discussions and consultations on possible reforms to the regulatory environment for media. The implications of the digital era for censorship and classification are also under active consideration by the Chief Film Censor's office.
- 1.37 While we have been able to draw on the breadth of research undertaken in New Zealand in this area over the past decade, the terms of reference for our review differ from the earlier reviews and indeed from the reviews underway in the United Kingdom and Australia.

Regulatory gaps in the new media environment

- 1.38 Our primary brief is to identify the regulatory gaps which have emerged as traditional *news media* have moved their publishing activities online.
- 1.39 We have also been asked to consider whether there is a case for extending media regulation to some of the new participants – for example, current affairs bloggers and news websites which are currently unregulated. A quid pro quo of such an extension would be to see these new publishers gain access to the legal and organisational preferences which are currently reserved for the traditional news media.
- 1.40 Although focused on the regulatory environment, rather than explicitly on press standards, the drivers behind our review are in many respects similar to the overseas inquiries discussed above. Like their counterparts in Australia and the United Kingdom, New Zealand media companies are confronting falling profits, increasing competition from non-traditional publishers, the challenges of convergence and the requirements of continuous news cycles.
- 1.41 In an introduction to its 2008 Annual Report, the New Zealand Press Council acknowledged the threats to the news industry as a result of the twin effects of the internet and the undercutting of the advertising model which had supported news gathering for more than 150 years:¹⁵

...As the audience has migrated into the electronic media so newspapers have gone there too but because cash has declined, the demands of serving perpetual website updates, blogging and multi-media reporting have not always been met with correspondingly increasing staffing...

...Journalists are notorious complainers but it is reasonable to question if print reporters being required to produce reports across a wide range of outlets across an ever-increasing time frame is conducive to good in-depth reporting.

- 1.42 Alongside these internal pressures, the traditional news industry is also confronting the external pressures arising from the lack of regulatory parity between news media and unregulated web publishers on the one hand, and broadcasters and print publishers on the other.
- 1.43 The degree of control exerted by the state over the media has varied over time and with respect to different mediums. Traditionally, print media have been governed by a self-regulatory body, the Press Council, which responds to public complaints and adjudicates these against a set of agreed journalistic principles.
- 1.44 Broadcasters, on the other hand, are currently regulated by an Independent Crown Entity, the Broadcasting Standards Authority (BSA), a government appointed complaints body whose mandate is to enforce a series of statutorily backed industry codes designed to maintain standards of decency, fairness, accuracy and privacy in free-to-air and subscription broadcasting services.
- 1.45 However significant gaps and contradictions are emerging in these parallel systems of state and self-regulation for print media and broadcasters as the channels for delivering news converge in the multi-media digital environment.
- 1.46 More significantly, traditional news media find themselves competing for audience share with online publishers, some of whom are positioning themselves squarely in the news and current affairs segment, but who are not currently subject to any regulatory body.
- 1.47 Broadcasting Standards Authority chair Peter Radich has been explicit about the tensions this lack of parity creates for traditional broadcasters, stating in the BSA's 2010 Annual Report:¹⁶

We are acutely aware of the challenges involved in maintaining standards in the segment of traditional broadcasting when similar standards do not apply to Internet broadcasting. It is time for the Broadcasting Act to be reviewed.

- 1.48 Similar sentiments were expressed by newspaper executives and web editors with whom we spoke in the course of our preliminary consultation. They explained how in the porous digital environment they were often competing directly with publishers who, while subject to the law, were not held accountable to the same regulatory and ethical constraints as journalists. They cited instances where bloggers had breached court orders on their websites and readers could find the suppressed information just a "mouse click away" from the news story, effectively placing social media in the same competitive space as conventional news media.¹⁷

- 1.49 On the other side of the media divide, some bloggers with whom we consulted expressed frustration at being denied access to news sources, including admission to organisations like the Parliamentary Press Gallery and forums such as press conferences because of their lack of official status and legal recognition as part of the “news media.”
- 1.50 Over and above such pragmatic and competitive concerns looms the much larger public interests question: how to protect and nurture the generation and dissemination of news and current affairs in this disruptive new environment?
- 1.51 Before the advent of the read/write web there was little difficulty in defining what was meant by the term “news media“. Similarly there was a broad acceptance of the special legal privileges and accountabilities attached to the news gathering and publishing activities of media companies. That consensus no longer exists.
- 1.52 A critical question we have been asked to address as part of our review is;
- whether, and to what extent, the jurisdiction of the Broadcasting Standards Authority and/or the Press Council should be extended to cover currently unregulated “news media” and, if so, what legislative changes would be required to achieve this end.
- 1.53 In order to answer this question we must first unpack the assumptions which underpin it and discuss the following critical policy issues:
- is it possible, and desirable, to define “news media” in the web 2.0 era?
 - if so, are the traditional justifications for affording the “news media” special privileges, and subjecting them to specific industry regulation, still valid in this new publishing environment?
 - and, finally, if those justifications remain valid, what type of regulatory environment should apply, and to whom?

Remedying harm in the web 2.0 era

- 1.54 The third question we address in this paper concerns the wider issue of what remedies and redress the public should have when they suffer significant harms as a result of publishing on the internet.
- 1.55 Specifically, our terms of reference require us to consider:
- whether the existing criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence and privacy are effective in the new media environment and if not whether alternative remedies are available.
- 1.56 In addressing this question we are concerned not just with the news media and the laws and regulations governing them, but rather with the broad spectrum of publishers discussed earlier, from the amateur blogger whose words may be read by a handful of others, to the celebrity whose tweets may be read by a million people or more.

- 1.57 These novel forms of publishing are in fact already subject to both the criminal and civil law irrespective of the fact that publication takes place on the internet. The exercise of free speech on the internet is, in theory at least, subject to the same limitations that apply in other mediums.
- 1.58 However, many of the statutes directed at preventing and punishing harms arising from various types of publishing were written before the internet was invented and so are not necessarily capable of capturing speech abuses that arise in the web 2.0 era.
- 1.59 In Part 2 of the Issues Paper we survey the extent of these harms; outline the legal remedies currently available and discuss how the gaps and uncertainties in these laws might be addressed to better deal with the digital environment.

Structure of the Issues Paper

- 1.60 The first part of this paper is focused on the news media and the questions we have been asked to address relating to news media regulation.
- 1.61 We begin, in chapter 2, by providing a descriptive overview of the New Zealand news media landscape on the web. While not claiming to be comprehensive, this chapter aims to provide a sense of the spectrum of publishing occurring on the web, drawing out the distinctions between the different types of publishers and the extent to which their activities might be regarded as “news-like”.
- 1.62 In chapter 3 we survey the statutory privileges and exemptions which currently apply to the news media in New Zealand and briefly discuss the traditional rationales behind granting the media this special legal status. Alongside these statutory privileges and exemptions we also discuss the institutional and organisational conventions which exist to assist the news media in its news gathering activities.
- 1.63 Having described both the web 2.0 publishing environment, and the current legal status of the news media, we then move on in chapter 4 to address the first question posed in our terms of reference: is it possible to define “news media” for the purposes of the law? In addressing this question we first briefly traverse the historical origins of the mass media and then discuss the evolution of the constitutional role of “the press” in a modern democracy. We then unpick some of the fundamental principles inherent in journalism if it is to fulfil these civic functions and in the process identify what it is that distinguishes “news” from other types of speech. We then attempt to apply these distinctions to the spectrum of publishers outlined in chapter 2 and reach some tentative conclusions about the possibility, and desirability of classifying them as “news media.”
- 1.64 Finally we set out the argument for why this special class of speech must be preserved - whoever is exercising it - and why standards and accountability are critical to its survival.

- 1.65 In chapter 5 we describe the current parallel systems of accountability for the news media operating in New Zealand and examine the strengths and weaknesses of both the Press Council and the Broadcasting Standards Authority. Our focus is on convergence, and the need for a regulatory model capable of responding to the challenges and opportunities of the digital web publishing environment.
- 1.66 Chapter 6 turns to developments in news media regulation overseas and sets out the range of regulatory approaches possible – from a system which relies on the law, backed by internal industry standards, and consumer/user feedback at one end of the regulatory spectrum through to state regulation at the other.
- 1.67 We then put forward our preliminary proposal for a new independent converged news media regulator and outline two options for the jurisdiction of this regulator. In option one we discuss the merits of compelling some classes of publishers to come under its jurisdiction, and in option two we discuss a purely voluntary option.
- 1.68 In the final two chapters of the paper we address the third leg of our terms of reference: whether the legal remedies available for those who suffer serious harms as a result of speech abuses are fit for purpose in the web 2.0 era.
- 1.69 Chapter 7 outlines the scope of these harms and provides an overview of the legal and non-legal remedies currently available. This chapter includes a discussion of the self-regulatory systems and reporting tools available on sites such as Facebook to manage speech harms.
- 1.70 Chapter 8 examines the adequacy of these laws in dealing with speech abuses in the web era and makes preliminary proposals for how the law might be amended or in some cases new offences created to deal with the new publishing environment.
- 1.71 Finally in chapter 8 we put forward for discussion the possibility of establishing a new tribunal to provide those who have been harmed by serious speech abuses with swift and easily accessible remedies. We also put forward some preliminary ideas for how the law might deal with offensive speech in the new digital environment.

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- 6 Alexia Tsotsis "To celebrate the Jan 25 Revolution Egyptian Names his firstborn 'Facebook'" (2011) TechCrunch < www.techcrunch.com/2011/02/19/facebook-egypt-newborn > .
 - 7 International Telecommunication Union "Measuring the Information Society" (2011) < www.itu.int/ITU-D/ict/publications/idi/2011/Material/MIS2011-ExceSum-E.pdf > .
 - 8 This figure is derived from the number of fixed, mobile and broadband connections currently allocated in New Zealand and will include multiple accounts so cannot be interpreted as total users. See InternetNZ "Internet Access Numbers" (2011) < internetnz.net.nz/news/blog/2011/Internet-access-numbers > .
 - 9 Don Tapscott "G3 and the Internet: Sarkozy Messes With a Good Thing" *Huffington Post* (United States, 27 May 2011) < www.huffingtonpost.com/don-tapscott/we-need-more-interent-not > .
 - 10 Special Report: The news industry "The end of mass media: Coming full circle" *The Economist* (United Kingdom, 7 July 2011).
 - 11 For the full terms of reference and supporting information see < www.levesoninquiry.org.uk > .
 - 12 Australian Government Independent Media Inquiry, Department of Broadband, Communications and the Digital Economy, < www.dbcde.gov.au/digital_economy/independent_media_inquiry/consultation > .
 - 13 Australian Law Reform Commission *National Classification Scheme Review* (ALRC DP77, 2011) < www.alrc.gov.au > .
 - 14 Terms of reference for the review and related research and reports can be accessed from < www.med.govt.nz/templates/MultipageDocumentTOC____27318.aspx > .
 - 15 New Zealand Press Council "Annual Report 2008" at 11-12. < www.presscouncil.org.nz > .
 - 16 Broadcasting Standards Authority "BSA Annual Report 2010" (2010) at 4 < www.bsa.govt.nz > .
 - 17 For example Cameron Slater, author of a blog titled *Whale Oil Beef Hooked* has campaigned against the use of suppression orders and in September 2010 was convicted on charges related to breaches of non-publication orders by publication on his blog. *R v Slater* [2011] DCR 6. His activities and the site received widespread coverage in the mainstream media. Mr Slater appealed to the High Court against the convictions and sentences imposed. The appeals were dismissed on 10 May 2011, but Mr Slater was subsequently granted leave to appeal to the Court of Appeal in relation to one question of law, as to whether the information or material posted on the *Whale Oil* blog constituted a "report" or "account" of proceedings in breach of the provisions of the Criminal Justice Act 1985. At the time of writing, the Court of Appeal has not yet issued a judgment in this matter.

